IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CONTEMPT PETITION NO.63 OF 2004
IN
APPEAL NO.961 OF 2000
IN
NOTICE OF MOTION NO.2748 OF 2000
AND
SUIT NO. 4055 OF 1999

Mehrunissa Shah Mohammed Choudhary ...Petitioner
V/s.
Shaukatali S. Khan & others ...Respondents

Mr. A.C.Singh with A.Yadav and D.R.Shah for the petitioner K.K.V. Kurup for respondent no.1/Defendant No.1 in the Suit Respondent No.1 present in Court.

CORAM:- SMT. ROSHAN DALVI, J

24TH JULY, 2008

P.C.

This Suit has been filed for recovery of Rs. 1,15,000/- on account of certain amounts lent and advanced by the plaintiffs to the defendants as shown in the particulars of

claim, Exhibit J to the plaint.

2. For the repayment of advances, the defendants have entered into a Deed of Mortgage with the plaintiff on 14-7-1997. The Deed of Mortgage is notarised. It is not registered. It is on a stamp paper dated 9-5-1997 issued in the name of defendant no.1 under No. 834. The original document is produced.

3. The factum of the advances made by the plaintiffs upon the defendants and the execution of mortgage to secure the loan is not specifically denied by the defendants in this application. In fact it has been admitted in several letters of the defendants themselves.

4. Upon the interim applications taken out by the plaintiffs the defendant made a statement on 22-11-2000 in an Appeal from an order passed in the interim application taken out in the Suit that pending the admission of the appeal, defendant no.1 shall not sell, transfer or create any third party rights in the Suit premises. The order came to be passed that pending the admission of the appeal, the defendants would not create any third party rights.

5. On 4-4-2001 this order came to be continued.

6. On 5-6-2002 the notice of motion of the plaintiff came to be disposed off granting injunction in terms of prayer(b) of the plaintiff's notice of motion after recording admissions of the defendants in respect of the loans advanced by the plaintiff and offering the suit property as security. Prayer(b) was for an injunction restraining the defendant from selling or creating any third party rights in the suit premises.

7. It is an admitted position that the suit premises interalia bears CTS No. 122. The defendant is the co-owner of the suit property with his two brothers. Defendant No.1 sought to mortgage his share in the suit property under Survey No. 13, CTS Nos .122 of Plot No.20, Lokmanya Tilak No.2, M.G. Road, Goregaon West, Mumbai- 400 062.

8. It is the contention of the plaintiff that whilst the loan remained due and payable and the suit remained pending and the interim injunction continued, the defendants, instead of paying off the loan, sought to create third party interest in the property by entering into agreements for sale, power of attorney as well as conveyance. They also gave public notices with regard to the sale of the suit property.

9. The Plaintiffs have produced copies of the documents entered into by defendant no. 1 along with his co-owners being his brothers in respect of interalia the suit property under CTS No. 122.

10. The first such agreement is a registered agreement for development with one M/s. In-tech India dated 3-9-2002 interalia for the suit property. The agreement is registered. Consideration under the agreement is paid by the developers and received by the three brothers including defendant no.1. Contemporaneously, with this agreement a power of attorney was executed on 30-8-2002 by the defendant no. 1 and his 2 brothers interalia for CTS No. 122 mortgaged to the plaintiffs under the aforesaid Mortgage Agreement. The Power of Attorney is also registered. The photograph interalia of defendant no.1 has been taken. Defendant No. 1 has signed against the photograph. Thereafter, on 21-8-2003 the three brothers entered into yet another agreement with another party one Preeti Enterprises. That agreement is unregistered. It is on a stamp paper of Rs. 20/- issued in the name of Preeti Enterprises. Defendant No.1 has interalia signed in the Execution Clause.

11. Thereafter, a Deed of Conveyance is shown to be executed again by the three brothers including defendant

no.1 on 31-12-2006 with one Shree Om Developers Pvt. Ltd. The Conveyance is registered. It shows receipt of Rs. 3 lacs each paid by three separate cheques on 15-2-2007 issued by the purchaser interalia in favour of the defendant no.1 and received by him. Contemporaneously, with that Deed of Conveyance a Power of Attorney is executed interalia by defendant no.1 along with his two brothers interalia for CTS No. 122 which is also registered and for which stamp duty is paid under a franking value issued by the office of the Sub-Registrar. The power of attorney is also interalia signed by defendant no.1.

12. Defendant No.1 has filed his affidavit in reply to the Contempt Petition on 10-10-2005. His signature in the affidavit in reply is similar to the various signatures on various pages of the aforesaid Agreement for Development, Power of Attorney, Deed of Conveyance, another Power of Attorney and on the last page of the unregistered Agreement aforesaid. A similar signature of defendant no.1 along with the signature of defendant no.2 appears under Deed of Mortgage dated 14-7-1997 on which the Suit is filed.

13. The Defendant has vaguely denied execution. He has infact justified the execution of the aforesaid documents. It is seen that he has executed several documents in favour of

several parties from time to time with regard to the same property. We are not concerned with the first defendant's act of executing a document for the same property in favour of various parties from time to time without cancelling earlier agreements in this notice of motion. We are also not concerned with the fact that these documents have been executed also by his two brothers who are the co-owners of the suit property. We are concerned with the share of defendant no.1 in such property mortgaged to the plaintiff since as far back as in 1997 and the orders passed by the Court in this Suit restraining the defendant from doing precisely what the defendant has done after interim orders came to be passed in the appeal as well as in the notice of motion itself.

14. It is seen that defendant no.1 is an incorrigible executant of documents without regard to his title, right or interest in the property in executing documents one after another. Several encumbrances are created by him in the suit property even after the orders of injunction.

15. A clear case of breach of the order of injunction is made out. Hence, an order under order XXXIX Rule 2A of the CPC is required to be passed. It is seen that under that provision the defendant who has willfully disobeyed the

order of injunction, not once but again and again, can either be detained in civil prison or the property of defendant no.1 be attached for a period of one year.

16. Similarly, under the provisions of Order XXXIX Rule 11(1) which is the Bombay High Court Amendment, the defendant's defence in the Suit can be struck off. It is seen that the defendants have admitted the loan granted by the plaintiff and acknowledged their liability to repay the loan and requested further time for repayment. This aspect has been clarified in the order of injunction dated 5-6-2002 itself. Whereas under the provisions of Order 39 Rule 11(1) the defence of the 1st defendant can be struck off, under the provisions of Order 12 Rule 6 of the CPC a judgment on admission can be passed against both the defendants, upon the express admission of liability and security of payment for the repayment of loans and the consequent discharge of liability contained in the letters of the Advocates of defendants 1 and 2 annexed to the plaint. It is seen that the defendants have been represented in the Suit as well as in the appeal against an interim order. Yet Mr. Kurup, on behalf of defendant no. 1 contends that the Writ of Summons is not yet served and the service not waived. No written-statement is filed. No defence on merits is shown in the interim applications. The liability of the defendants is

admitted and acknowledged. Defendant no. 1 is a persistent defaulter as well as a consummate transferor of a single property.

17. Interest of justice to both parties would be served if the rights and liabilities of the parties are crystallised under the aforesaid provisions. Hence, the following order:-

O R D E R

1) Judgment on admission in terms of prayer (a) in the suit is passed against defendants 1 and 2.

2) The share of Defendant No. 1 in the suit property stands attached under the provisions of Order 39 Rule 2A of the CPC. The attachment shall continue in execution of the decree.

3) Any amount payable by the 3rd parties, under the aforesaid agreements/conveyance executed by them to Defendant 1 shall not be paid to him, but instead shall be paid to the plaintiff in Court.

4) If and when the entire decretal amount is paid off, the attachment on the suit property shall be raised.

5) The parties may consider settling the entire dispute finally with regard to the suit property between themselves as well as the various transferees by creating options through Mediation as the most appropriate mode of Resolution of their dispute.

6) Contempt Petition, Notice of Motion and Suit disposed off accordingly.

(SMT. ROSHAN DALVI, J)